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In the
Supreme Court of the United States

October Term, 1975

No. 64, Original

The State of New Hampshire, Plaintiff

v.

The State of Maine, Defendant

EXCEPTIONS AND BRIEF OF THE PLAINTIFF

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Francois, "Addendum to Second Report of the Regime of the Territorial Sea", Intl. Law Commission, Fifth Session (1953) U.N. Doc. A/CN 4/61 Add. 1 . 19, 24
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International Law Commission, Sixth Session, Summary Record of 260th Meeting (1954) U.N. Doc. A/CN, 4/SR-260 21
Kennedy, "Brief Remarks on Median Lines and Lines of Equidistance and on the Methods Used in Their Construction" (1958), U.N. Dec. A/Conf. 13/C.4/SR, 32 26
Peace Treaty of Paris, 30 May 1814, Art. III, sub. 5 (Martens, N.R. II, 1) 26
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Boggs, International Boundaries: A Study of Boundary Functions and Problems (1940) 31
Bouchez, "The Fixing of Boundaries in International Boundary Rivers", 12 Intl. & Comp. L.Q. 789 27, 28, 29
Corpus Juris Secundum, XXI, Courts, s. 222 4
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Cukwurah, The Settlement of Boundary Disputes in International Law (1967) 6
Department of State, Bureau of Intelligence and Research "Islands: Normal and Special Circumstances", RGES-3 (1970) 29
Ely, "Seabed Boundaries between Coastal States: The Effect given to Islets as Special Circumstances", 2 Intl. Lawyer (1972) 27, 28
Fitzmaurice, "Some Results of the Geneva Convention on the Law of the Sea"; 8 International & Comparative Law Quarterly 73 (1959) 7
Glos, International Rivers: A Policy-Oriented Perspective (Singapore, 1961) 6, 27
McDougal & Burke, Public Order of the Oceans (1962) 7, 15, 23
Opinions of the Attorney General of the United States, VIII, 175 5
Pearcy, "Geographic Aspects of the Law of the Sea", 49 Annals of Assn. of American Geographers 1 (1959) 7, 9, 17, 23
Shalowitz, Shore and Sea Boundaries (1962, U.S. Dept. Commerce, 2 vols.) 5, 6, 8, 23
Snow, E. R., Lighthouses of New England (New York 1973) 10
Verzyl, International Law in Historic Perspective (1970) 27
Wisdom, The Law of Rivers and Watercourses (1962) . 6, 8

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Appendix A, Excerpts from Convention on the
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Appendix B, Illustrative map of Portsmouth Harbor

In the
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October Term 1975

No. 64, Original

The State of New Hampshire, Plaintiff

v.

The State of Maine, Defendant

EXCEPTIONS AND BRIEF OF THE PLAINTIFF

INTRODUCTION

The issue in this case is the determination of the location of the lateral marine boundary between New Hampshire and Maine in the area of the Atlantic Ocean lying between the mouth of Portsmouth Harbor on the mainland and the entrance to Gosport Harbor in the Isles of Shoals (the latter being a group of islands lying about six miles offshore).

Plaintiff raised this issue by its motion for leave to file complaint against defendant, filed in this Court June 6, 1973, which motion was granted by the Court November 5, 1973 (414 U.S. 810). The defendant filed an answer denying the claims of the plaintiff and setting forth several alternative claims as to the

proper location of the boundary in question. The matter was referred to Honorable Tom C. Clark as Special Master on November 5, 1973 (414 U.S. 996). His report dated October 8, 1975, is the result of that referral.

Pretrial proceedings were held in April 1974 to narrow the issues in preparation for a trial scheduled to begin August 12, 1974. Between April and the scheduled trial date, the Attorneys General of both states, at the urging of the Special Master, reached a tentative settlement of the dispute which on September 23, 1974 they filed with the Special Master in the form of a motion for entry of judgment by consent.

On September 20, 1974 the New Hampshire Commercial Fishermen's Association sought leave to intervene in the case in opposition to the proposed consent decree, and, although denied status as a party, it was permitted to proceed as *amicus curiae*, and did so, filing several briefs and memoranda of law on the principal issues, as did the parties. On February 25, 1975, the parties filed a stipulation incorporating in the record "for decision of this action" various documents and maps and agreeing that judicial notice might be taken of a wide variety of maps, state papers, government publications, ancient historical documents and reputable works of history.

In his report the Special Master concluded that the proposed consent decree ought to be rejected and then proceeded to decide the case on the basis of the stipulated record without further evidentiary hearings.

The boundary line proposed by the report is a straight line connecting the middle of the mouth of Portsmouth Harbor with the middle of the mouth of Gosport Harbor in the Isles of Shoals. In determining the location of the two terminal points of this boundary line, the Special Master rejected the "thalweg principle" on which the proposed consent decree had been based and ruled that "the geographic middle" of the mouth of each harbor should be used in place thereof. The Special Master also ruled that the closing lines of the mouths of the two harbors were located at points somewhat different from those recommended in the proposed consent decree, in each case closer to the interior of the harbor.

New Hampshire has taken no exception to the rejection of the proposed consent decree. The reasons advanced by the

Special Master for ruling in favor of its rejection are considered largely unanswerable. Further, New Hampshire has suffered no prejudice from this ruling, since the boundary now proposed by the Special Master is more favorable to it than that recommended in the proposed consent decree.

We agree with the Special Master's rulings that a median line should be used to determine "the geographic middle" of the mouth of each harbor, that the mouth of each harbor is located on a closing line connecting the headlands, and that there should be a straight-line boundary across the open sea connecting the two terminal points. We are also satisfied with his ruling locating the middle of the mouth of Gosport Harbor.

Our exceptions, set forth below, are limited and relate solely to the Special Master's choice of the point where the median line intersects the closing line of Portsmouth Harbor and the methods used to make this choice.

In our view, the chief error in the Special Master's method of drawing the median line at the mouth of Portsmouth Harbor is in the use of "low tide elevations" in the River as points of reference. By "low tide elevations" (as distinguished from islands), we mean areas of land or rocks which are completely submerged at high tide but are surrounded by and above water at low tide. See *United States* vs. *Louisiana*, 394 U.S. 11, 60. The Special Master acknowledges and seeks to justify his use of "low tide elevations" in calculating the median line (Report, pp. 42-43, note 84). His use of a "low tide elevation" at Whaleback Reef in Portsmouth Harbor as a point of reference is, in New Hampshire's view, particularly erroneous and prejudicial to its position. Had this "elevation" not been used, then the median line would have crossed the closing line of Portsmouth Harbor approximately 350 yards to the northeast of the site chosen in the report (Report, p. 43), thus advancing the entire lateral marine boundary accordingly, in a northeasterly direction.

EXCEPTIONS

The State of New Hampshire excepts to the following findings of fact and rulings of law in the Master's Report:

1. "The use of . . .low tide elevations in the Piscataqua River

is recommended by several factors." (Report, p. 42, note 84).

2. "The significant points in the Piscataqua Harbor are those low-tide elevations and low water lines on either side of the harbor that are nearest each other; the low water line at Odiornes Point and rocks that expose at low tide off Jaffrey Point, and in Whaleback Reef" (Report, pp. 42-43, note 84).

3. "Therefore, in this case, it (the geographic middle) is at approximately 43°3' 1.7" North and 70° 42' 8.0" West" (Report, p. 43).

4. Consistent with pars. 1, 2 and 3 above, exception is also taken to the location of the boundary line marked "Maine /New Hampshire" on the National Ocean Survey Chart, C.&G.S., No. 211, filed with the Report.

ARGUMENT

I.

THE USE OF "LOW TIDE ELEVATIONS" IN CALCULATING THE POSITION OF THE MEDIAN LINE AT THE MOUTH OF PORTSMOUTH HARBOR WAS ERRONEOUS.

(a) The Royal Decree of 1740 Does not Delimit the "Middle of the River" by Reference to Low Tide Elevations.

The language of the royal decree must be construed with reference to the facts on which the decree was based and the circum stances under which the language was used. 21 C.J.S., Courts, § 222, p. 409-411; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *The Grisbadarna Case*, in Scott, The Hague Court Reports (1916) 12 at 127. See also, *United States* v. *Wise*, 370 U.S. 405, 411 (1962). Therefore, as the Special Master concluded, the phrase "middle of the river" occurring in the 1740 decree must be interpreted in accordance with the facts and circumstances existing in 1740. (Report, pp. 40-42).

So far as New Hampshire has been able to determine, the low tide elevations in question are not shown on any chart or map submitted by the parties or by *amicus curiae*, nor on any other chart or map published prior to, contemporaneous with, or within a reasonable time after the 1740 decree. As the Special

Master concluded, in another connection, "it cannot be said that uncharted 'rocky reefs' or later navigational aids could have played any part in the deliberations of the King and Commissioners" (Report, p. 36).

The "middle of the river", which constituted the boundary between the states from and after the 1740 decree, and which constitutes the boundary to this day, was therefore determined without reference to low tide elevations. Since the present river boundary is the one established by the 1740 decree, it should not be drawn with reference to the low tide elevations, and neither, perforce, should the intersection of the middle of the river with the closing line of the harbor.

(b) The Median Line Must be Measured from the Banks of the River and Not from Low Tide Elevations.*

The Supreme Court has established that the median line of a river is the line which is "midway between the main banks of the river." *Georgia* v. *South Carolina*, 257 U.S. 516, 523 (1922). In *New Jersey* v. *Delaware*, 291 U.S. 361, 379 (1933) the median line was described as the line "halfway between the banks". The median line was defined in *Arkansas* v. *Mississippi*, 250 U.S. 39, 43, 45 (1919) as "the line equidistant between the banks [of the river]." In 8 *Opinions of the United States Attorney General* 175, the Attorney General opined that the line of the middle of a river is the middle of the river bed, between the banks of the river.

That the median line is fixed by reference to the main banks of the river is universally supported by other authority. See 1 McNair, Oppenheim's International Law (1928), 425; 2 Shalowitz, Shore and Sea Boundaries (1964), 374, note 30.

It was recognized in *Georgia* v. *South Carolina*, 257 U.S. 516, 523 (1922) that in certain circumstances the bank on an island in the river may be used in determining the median line. However, this exception to the general principle has been applied only in the case of islands, and not in the case of low-tide elevations.

The measurements of the median line from the main banks of the river (or, where applicable, from islands in the river) applies the underlying theory of the median line principle: that each riparian state owns half of the water and bed of the river. *Ingraham* v. *Wilkin son*, 4 Pick. (21 Mass.) 268 (1826); *United*

* See definition in *U.S.* v. *California* 382 U.S. 448, 450, and Appendix A of this brief.

States v. *Elliott*, 131 F. 2d 720 (10th cir., 1942); *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Wisconsin* v. *Michigan*, No. 12, Orig., Supple mental Report of Special Master, 7 (the practice applies "the rule of equality of water area . . ."); Cukwurah, The Settlement of Boundary Disputes in International Law (1967), p. 50; Glos, International Rivers (1961) 110; 93 C.J.S., Waters, §71, p. 745-746. The "river" is all of the water and the subsoil between its banks. Wisdom, The Laws of Rivers and Watercourses (1962) 3; and the banks of the river border and enclose the river. *Oklahoma* v. *Texas*, 260 U.S. 606, 631 (1923); *Mammoth Gold Dredging Co.* v. *Forbes*, 104 P. 2d 131, 137 (Cal., 1940); *Seibert* v. *Conservation Commission of Louisiana*, 159 So. 375, 377 (La., 1935); Wisdom, *supra*, 10-11, 38-40.

In the instant case, the water flowing between Whaleback Reef and Gerrish Island is as much part of the river as is the water between the reef and the New Hampshire bank. Whaleback Reef does not border or enclose the river; it is located almost one-third of the way into the river from the Maine shoreline; and the waters between the Reef and the Maine shoreline and adjacent islands are sufficiently deep, are naviga ble and in fact actively navigated, and are not inextricably linked to the mainland. To measure the median line from low tide elevations in the Reef, rather than from the banks of Gerrish Island or Wood Island, gives Maine much more than half of the river water, and New Hampshire much less. The same result obtains with respect to the river bed. Low tide elevations are a part of the river bed. *United States* v. *Ray*, 423 F.(2d) 16, 20 (5th Cir., 1970); *Oklahoma* v. *Texas*, 260 U.S. 606, 631, 632; *Alabama* v. *Georgia*, 64 U.S. 505, 515; *United States* v. *Chicago etc. R. Co.*, 312 U.S. 593, 597; 1 Shalowitz Shore and Sea Boundaries (1962) 228. To measure a median line from a point in the bed, rather than from its edge (i.e., the banks of the river on the mainland or an island) has the obvious effect of giving Maine more than half of the bed and New Hampshire less than half.

The measurement of the median line from low tide elevations therefore does violence to the principle underlying the median line rule; that each riparian state should receive half the river and river bed. It produces a "distorted and anomalous" situation (Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea", 8 Internation al and Comparative Law Quarterly 73, 85 note 30 (1959)), and violates "the major community policy at stake" with respect to boundary problems of opposite states: "that of achieving equitable apportionment". McDougal & Burke, Public Order of the Oceans (1962), p. 428. See also Pearcy, "Geographic Aspects of the Law of the Sea", 49 Annals of the Association of American Geographers (1959) 1, 16.

A former Geographer of the United States Department of State has squarely addressed the issue of whether a median line between opposite coasts may be drawn from offshore formations. Boggs, "Delimitation of Seaward Areas Under National Jurisdiction", 45 American Journal of International Law, 240, 257-258 (1951). He states,

> "Islands in a lake, gulf or bay may complicate the determination of the base line employed in laying down the median line. Because islands, large and small, are found both near and far out from coasts in water bodies of all sizes and shapes, it seems incontrovertible that *the median line should, as a general rule, be derived as nearly as proves feasible only from the mainland coast.* [emphasis supplied]
>
> "Obviously, some islands must be treated as if they were part of the mainland. The size of the island cannot in itself serve as a criterion as it must be considered in relation to its shape, orientation and distance from the mainland. The most reasonable and workable rule is believed to be to draw *that pair of parallel lines* tangent to opposite ends or sides of the island which encloses the *least area of water* between island and mainland. . . . Then, if the land area of the island (properly planimetered from the low tide shoreline) exceeds the water area bounded by the parallel lines, the island and mainland, the island should be reckoned as if part of the mainland base line, in laying down the median line. . . ." At p. 258. See the illustration of the median line technique in fig. 3, p. 257.

Although Boggs' analysis dealt with off-shore islands, his reasoning applies even more forcefully to low tide elevations. Such formations should be disregarded in drawing the median line unless they are so integrally related to the mainland as to constitute part of the coast.

(c) The Low Tide Elevation in Whaleback Reef Is Not Part of the Bank of the River.

The line of the middle of the river is the line which is midway between the banks of the river. The term "banks" has been variously defined, but it is clear that the banks are the areas which border, enclose and confine the river. See 2 Shalowitz, *supra*, at 373, and the authorities there cited. See also, *Howard* v. *Ingersoll*, 17 Ala. 781 (1851); Wisdom, *supra*, 10-11. In no way can any of the low tide elevation in Whaleback Reef be said to border and enclose the river.

At issue here is whether these elevations should be assimilated to the bank of the river so as to be treated as part of the bank. They cannot be so treated. In *United States* v. *Louisiana*, 394 U.S. 11 (1969) the Supreme Court considered whether certain islands could be consid ered the headlands of bays. 394 U.S. at 60-66. This depended on whether the islands in question were "so integrally related to the main land that they are realistically part of the 'coast' . . ." 394 U.S. at 66. In this connection the Court stated:

> "While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." 394 U.S. at 66.

Using the "island" analogy, the elevation at Whaleback Reef is small; in fact, it is merely the tip of a rock which protrudes at low tide. The same is true of every other elevation in the Reef. The elevation therefore does not meet the size criterion in the above quotation from *United States* v. *Louisiana*. Shalowitz in his treatise, 1 *supra* at 161 note 125 says:

> "The coastline should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters, or they form an integral part of a land form."

Furthermore, the elevations in the Reef must be considered individually, rather than in relation to each other, in a "leap-frogging" manner, or as a unit. See *United States* v. *Louisiana*, No. 9, Orig., Report of Walter P. Armstrong, Jr., Special Master, 41. It is not the entire reef which is to be considered, but merely the individual rock or rocks which protrude at low tide. The "reef" consists of these individual rocks.

The low tide elevation used by the Special Master at Whaleback Reef is nearly one-third of the way into the river as measured from the nearest point on the coastline of Gerrish Island. A formation this far into the river cannot be considered part of the bank of the river.

The waters between the elevations in the reef and Gerrish Island (as well as the waters between the reef elevations and Wood Island) are up to eighteen feet deep, are navigable, and are in fact frequently navigated by vessels as large as 65 feet. See Pearcy, *supra*, 1 at 9. There is no inextricable and integral relationship between the waters and the shore. Finally, the elevations significantly depart from the general direction and curvature of the coastline on Gerrish Island.

The elevations in question therefore do not satisfy any of the criteria established by the Supreme Court in *United States* v. *Louisiana*, *supra*, for determining whether such formation should be considered part of the coastline. The Special Master, *supra*, using the criteria established by the Supreme Court in *United States* v. *Louisiana*, 394 U.S. 11, 66 (1969), concluded that certain low tide elevations along the Louisiana coast could not be assimilated to and treated as part of the mainland. See Report of Walter P. Armstrong, Jr., Special Master, 37, 38, 41, 52-53, in same case.

Moreover, the use of these elevations does not satisfy the test established by Boggs, *supra*, at pp. 257-258, for determining whether a particular off-shore formation can be treated as part of the mainland for the purpose of drawing a median line. The area of the elevation at Whaleback Reef, and indeed, the area of the entire reef, is far less than the water area between the elevation or reef and the shore on Gerrish Island.

Although the Special Master used a rock exposed at low tide off Whaleback Reef rather than the main ledge of the reef where the light house stands, as the point of reference of which we complain, history shows that the low, small main ledge of Whaleback Reef itself has been very precarious and exposed perch for the lighthouse, which has several times been destroyed or severely damaged by wave action because of the low, small profile of the ledge on which it stands—a further reason for not considering any part of the reef to be associated with the river bank. See E. R. Snow, Lighthouses of New England (New York 1973) chapter 21.

The low tide elevation at Whaleback Reef therefore cannot be treated as part of the river bank, and should be ignored in drawing the median line.

The conclusion of the Special Master that the median line may be drawn from low tide elevations should not carry with it the assumption that the Special Master implicitly made the necessary factual findings to support his conclusion. This issue first appeared in the case as a footnote in the Special Master's Report (Report 42, note 84). It was never addressed by the parties, and no evidence was ever presented thereon. The Special Master's conclusion is based on his general assumption, which the State of New Hampshire maintains is erroneous, that low tide elevations are juridically the same as islands, and in all cases can be used to draw a median line, regardless of whether the criteria established in *United States* v. *Louisiana*, *supra*, or set forth by Boggs, *supra*, have been met.

(d) The Practice in Drawing Median Lines in Rivers Has Been to Ignore Low Tide Elevations.

Median lines in boundary waters between states of the United States, and between countries, have in practice been drawn without reference to low tide elevations. The most recent example in this country is the boundary line established in

Texas v. *Louisiana*, No. 36, Original (1975). The Special Master in that case established as the boundary line in Sabine Lake and Sabine Pass, which divide Texas and Louisiana, "the median line marked on Louisiana Exhibits DDD and III. . . ." Report of Special Master, p. 48. These exhibits are kept in the storage area in the Supreme Court Building, in Box 7 of the Exhibits in *Texas* v. *Louisiana*, No. 36, Orig. An examination of these exhibits and an analysis of the line therein, by plotting with dividers, reveals that the median line was measured from the low water mark on the actual banks of the lake and pass, without reference to offshore islands and marshes.

The proceedings in *Wisconsin* v. *Michigan*, No. 12 Orig. (1935), also demonstrate this practice. At issue in that case was the boundary line in Green Bay. The Supreme Court had previously concluded that the boundary was to be the geographic middle of the bay (295 U.S. 455, 462 (1935), and referred the case back to the Special Master for the purpose of drawing the line in accordance with the Court's decree. A chart was filed with the Special Master on which were drawn two lines—one labeled "Nearest Land Method", and the other labeled "Mid-section Method". See War Department, Coast Chart No. 2, "West Shore of Lake Michigan", on file in the Cartography Division, National Archives, Washington, D.C. It is clear from an analysis of the "Nearest Land Method" line that this is the median line which is everywhere equidistant from the land (including associated islands) of the opposite states. It is the median line drawn in accordance with the same principles which should govern the instant case.

From analyzing and plotting this line with dividers, it is clear that it was drawn without regard to "low tide" elevations in the bay. The line was drawn without regard to Horseshoe Reefs, off the Wisconsin coast, and goes directly through Whaleback Shoal, to the north of Horseshoe Reefs. The line was also drawn without regard to Eleven Foot Shoal, Corona Shoal, Minneapolis Shoal, North Drisco Shoal and Drisco Shoal, which are located in the vicinity of 45° 33' North and 86° 58' West, and St. Martin's Shoals, located in the vicinity of 45° 27' North and 86° 46' 20" West. It is therefore apparent that this median line was drawn by measuring from the coastline of the mainland and associated islands, and that "low tide" eleva-

tions were ignored.

The "Mid-section Method" line equally divides the water area bordered by the banks on the mainland, and ignores islands in the bay. It is clear that this line too, was drawn without regard to "low tide" elevations.

The boundary line reported by the Special Master in that case appears on War Department Chart No. 70, "North End of Lake Michigan", on file in the Cartography Division, National Archives, Washington, D.C. A smaller copy appears at "Exhibit B" appended to Supplemental Report of Special Master, on file in the National Archives. The Supple mental Report of the Special Master was accepted by the Supreme Court at 297 U.S. 547 (1936).

The Special Master noted, at page 8 of his Supplemental Report, that line BX on the Chart was "the exact geographical center of the bay" in that portion of the bay. An analysis of this line with dividers makes it clear that this line was drawn without regard to "low tide" elevations, particularly the "rock awash" located at 45° 5' 30" North and 87° 19' 20" West, near the Wisconsin coast. It also ignored Strawberry Islands, to the northeast of the "rock awash". (Although the Special Master found that this line represented the exact geographic center of the bay, he could not adopt it as the boundary because it traversed Chambers Island, which belonged wholly to Wisconsin. He therefore adopted line BC as the boundary in that portion of the bay, point C being adjacent to point X.).

The Special Master continued the boundary line in the bay by drawing line CK, point K being "practically in the center of the bay". (Supplemental Report of Special Master, p. 9). This is the case when that point is measured from the mainland, rather than from Strawberry Islands and Horseshoe Reefs, off the Wisconsin coast.

The Special Master next drew line KL, which he stated, at page 9, to be "almost exactly in the geographical center of the bay". This line represents the geographic median line measured from the mainland, without regard to Horseshoe Reefs and Whaleback Shoal.

The above cases demonstrate the practice in drawing median lines in rivers and inland waters between states to draw such lines by reference to the actual shore line on the mainland or

associated islands, and to ignore "low tide" elevations.

This is also the practice in drawing international frontiers in boundary rivers. In the treaty between El Salvador and Guatemala, April 9, 1938, the median line in the rivers between the two countries was established as the boundary. United States Department of State, Office of the Geographer, International Boundary Study No. 82-El Salvador-Guatemala Boundary (1968). The official maps drawn by the Joint Frontier Commission pursuant to and implementing the treaty show that the median lines were drawn midway between the banks, and ignored elevations in the rivers. See Mapas que Acompanan a Informe Rendido a los Respectivos Gobiernos por la Comision Mixta de Limites entre Guatemala y el Salvador (1942), especially Hoja No. 5-Secion de Suriano a Ocean Pacifico.

The frontier between France and Switzerland in Lake Geneva is the median line of the lake, which is "defined by the locus of the centers of circles enscribed between the Swiss and French banks". United States Department of State, Office of the Geographer, International Boundary Study No. 11, France-Switzerland Boundary (1961), p. 3.

It is clear, then, that in drawing median boundary lines in internal waters, these lines in practice are measured from the banks on the mainland or islands, and "low tide" elevations are ignored.

II.

THE SPECIAL MASTER HAS MISAPPLIED INTERNATIONAL LAW IN USING LOW TIDE ELEVATIONS IN PORTSMOUTH HARBOR TO CALCULATE THE MEDIAN LINE.

(a) The Rule that Low Tide Elevations Should Be Ignored in Drawing the Median Line is Consistent with the Territorial Sea Convention.

It has been explained that it is permissible to depart from the principle that the median line in a river is to be measured from the true banks of the river, and to measure the line from off-shore formations, when, because of the geographic nature

of the formation, its close proximity to the mainland, and the close affinity of the formation and the intervening waters to the mainland, the formation should be treated as part of the bank of the river. This principle is in accord ance with rules established in the Geneva Convention of the Territorial Sea and the Contiguous Zone (1958).

Article 3 of the Convention provides that "[e]xcept where otherwise provided in the Articles, the normal baseline for measuring the breadth of the Territorial Sea is the low water line along the coast...." This rule that the baseline (which is the line which divides internal waters and the Territorial Sea: Art. 5 (1) must follow the actual coastline may be departed from in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity...." In such situations, straight baselines may be drawn between appropriate points. Art. 4 (1). However, "[T]he drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters". Art. 4 (2). Mcreover, it is specifically provided that straight baselines "shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them". Art. 4 (3).

The scheme in the Convention therefore permits a departure from the actual coastline when the geographic circumstances mentioned in Article 4 (1) exist. But even when such geographic justification exists. speci fic baselines must be drawn in accordance with the criteria in Article 4 (2) and (3). These criteria ensure that baselines will be drawn only to and from those points which are so integrally related to the mainland that they should realistically be considered part of the coast.

Low tide elevations are specifically excluded as points to and from which straight baselines may be drawn. The reason for this was explained by the International Law Commission in its Commentary to its Draft Article 5, which was the basis of the convention Article 4:

> "Straight baselines may be drawn to islands situated in the immediate vicinity of the coast but not to drying rocks and drying shoals. Only rocks or shoals permanently above sea level may be used for this purpose. *Otherwise the distance between the baselines and the coast might be extended more than is required to fulfill the purpose for which the straight baseline method is applied*, and, in addition, it would not be possible at high tide to sight the points of departure of the baselines." Commentary (8), p. 15. [Emphasis supplied]. (Report of the International Law Commission, Eighth Session (1956) Gen. Ass. Off. Rec., 11th Sess. Supp. No. 9 (A/3159) pp. 13-15)

The Commission's point with respect to the portion italicized above is that when straight baselines are drawn to and from off-shore formations, the waters landward of the baselines become internal waters [Territorial Sea Convention, Art. 5 (1)], and the nature of low tide elevations, and their relationship with the mainland, are not such as to justify creating such an extended zone of internal waters.

McDougal and Burke also explain that "it is not normally expected that [a low tide evelation] has any particular use to the local population; nor can it realistically be considered as a dependable landmark for interested mariners." Public Order of the Oceans (1962), p. 388.

It therefore appears that the rationale of the Convention prohibition of drawing straight baselines to and from low tide elevations is that such formations, being merely barren rocky points protruding at low tide, of no particular use to the local population, and unsatisfactory for use by mariners, are not so integrally related to the actual coast as to warrant departing from the coastline and extending internal waters to baselines drawn to and from the elevations. Nor are the waters between the elevations and the mainland sufficiently linked to the land domain to constitute internal waters.

For the same reasons, and by analogy to these convention principles, low tide elevations cannot be considered part of the coast for the purpose of drawing a median line. The existence of a lighthouse on one of the elevations in Whaleback Reef does not justify using this elevation as a point from which to measure the median line, since, for reasons explained in the previous

section (that the criteria set forth in *United States* v. *Louisiana*, *supra*, and by Boggs, *supra*, were not satisfied), the elevation is not so integrally related to the bank of the river as to be treated as part of the bank.

The conclusion of the Special Master in the instant case relative to the use of low tide elevations (Report, p. 42 note 84) is based upon an erroneous application of the precise Convention rules which govern the delimitation of the *Territorial Sea* between opposite coasts, to the establishment of the median line in *internal waters*, i.e. the river. The relevant rules in the Territorial Sea Convention which the Special Master implicitly applied in the instant case are the following:

> *Article 12(1)*: "Where the coasts or two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its terr itorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured . . ."

> *Article 11(1)*: "Where a low tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea."

For a discussion of the factual and juridical differences between internal waters and the territorial sea, see *United States* v. *Louisiana*, 394 U.S. 11, 22 (1969). Waters on the landward side of the baseline of the territorial sea are internal waters [Territorial Sea Convention, Art. 5 (1)]; and the baseline of a river is the line drawn across its mouth between points on the low tide line of its banks [Territorial Sea Convention, Art. 13]. A river is part of a state's internal waters.

There is a distinction between applying the median line rule to the delimitation of river boundaries as opposed to territorial sea boundaries.

> "Because of the relationship between seaward boundaries not merely to the coastal States involved but to the international community which utilizes and depends upon the adjacent high seas, international law has specifically recognized different rules for delimiting the boundaries of the States adjacent to those waters." *Texas* v. *Louisiana*, No. 36, Orig., Brief for the United States in Response to Texas' Brief in Support of its Exceptions to the Report of the Special Master, filed September 15, 1975.

The International Law Commission recognized in its Commentary to its Draft Article 12, which was the basis for the Convention Article 12, that the rules therein "cannot be applied in all circumstances" and that internal waters could be subject to different rules. Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159), p. 18. The precise rules in Article 11 and Article 12 are meant to apply to offshore boundaries, and not necessarily to those in internal waters.

> "International boundaries to distinguish offshore sovereignty and rights are limited to those extending through the territorial sea and over the continental shelf. In internal waters any international boundaries are integral parts of those of the adjoining land area, hence not definable as offshore." Pearcy, *supra*, note 15, at p. 16.

The error made by the Special Master was to apply to the boundary in the Piscataqua River the rules that the outer limit of the territorial sea may be measured from low tide elevations within the territorial sea (Territorial Sea Convention, Art. 11(1)), and that therefore the median line *in the territorial sea* may be measured from these elevations (Art. 12(1)). See Report, p. 42, note 84. That low tide elevations may be used for drawing the median line in the territorial sea in no way implies that they can therefore be used for drawing the median line in internal waters. In fact, an analysis of Articles 11 and 12 reveals that the opposite is in fact the case. It will become clear in the ensuing discussion that the confusion, which has been recog-

nized to exist by the International Law Commission itself and by other commentators, arises from the "unfortunate" use of the phrase "as the baseline" in Article 11.

The history of Article 11 (1) reveals that its intent is that when a low tide elevation is located within a state's territorial sea as measured from the actual coastline, the elevation has its own territorial sea, and will thus cause a bulge in the territorial sea of the state

An early version of Article 11 provided,

> "Elevations of the sea-bed which are only above water at low tide and are situated partly or entirely within the territorial sea shall be treated as islands for the purpose of determining the outer limit of the territorial sea." Francois, "Second Report on the Regime of the Territorial Sea", International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61, p. 30, Art. 5 (1)

The comment of the Rapporteur with respect to this provision stated that,

> "a distinction is drawn between islands and drying rocks. . . .[A]n island has its own territorial sea; *a drying rock is deemed to be an island for this purpose only if it is situated partly or entirely within the territorial sea extending along the coast*. A drying rock situated outside the territorial sea is not regarded as having its own territorial sea. "[Emphasis supplied] Francois, *supra*, p. 33-34.

This Article was amended during the same session of the International Law Commission to read as follows:

> "Article 5: (1) As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast. . . . (3) Drying rocks and shoals that are exposed between the datum of the chart and high water if within the territorial sea, *may be taken as individual points of departure for measuring the territorial sea, thus causing a bulge in the outer limit of the latter.*" [Emphasis supplied].

> Francois, "Addendum to the Second Report on the Regime of the Territorial Sea", International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61/ Add. 1, Art. 5, pp. 5-6.

Immediately following these provisions was Article 5a, which permitted the drawing of straight baselines in areas where the coast was deeply cut into or where there were islands in its immediate vicinity, but stated that "baselines should not be drawn to and from drying rocks and shoals". Francois, "Addendum . . .", supra, at p. 6. The distinction here being developed is between the concept that low tide elevations within a state's territorial sea have their own territorial sea, thereby causing a bulge in the state's territorial sea (which is permitted), and that of using low tide elevations for drawing straight baselines and thereby extending internal waters (which is not permitted).

The following Articles appeared in later versions of the Draft:

> "*Article 11.* Every island has its own territorial sea. An island is an area of land surrounded by water which is permanently above high water mark. . . ."
> *Article 13.* Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea."
> Francois. "Third Report on the Regime of the Territorial Sea", International Law Commission, Fifth Session (1954), U. N. Doc. A/CN. 4/77, p. 12-13.

The comment to Article 13 stated, at page 13:

> "A distinction has been made between islands and drying rocks. An island off the coast, even if situated outside the territorial sea, always possesses a territorial sea of its own. A drying rock is only deemed an island in this respect when situated wholly or partly within the territorial sea along the coast. A drying rock lying outside the territorial sea pos-

sesses no territorial sea of its own."

The following year, the International Law Commission redrafted the relevant portion of its previous Article 5, and designated it Article 12:

> "Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea." Report of the International Law Commission covering the work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 16.

The Commentary to this Article further explained it, and dealt with suggestions that it might be inconsistent with the rule in a previous article that straight baselines may not be drawn to and from drying rocks:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying rocks and shoals however which are situated outside the territorial sea have no territorial sea of their own.'
>
> 'The Commission considers that the above Article expresses the international law in force.'
>
> 'It was said that the terms of Article 5 (under which baselines are not drawn to or from drying rocks and shoals) might perhaps not be compatible within Article 12. The Commission does not consider them incompatible. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks are treated as islands in every respect. If they were, then, so far as the drawing of baselines is concerned, and in particular in the case of shallow waters off the coast, the distance between the baselines and the coast might conceivably be far in

> excess of that intended to be laid down by the method of these baselines." Report. . . . *supra*, at p. 16.

Rapporteur Francois, who authored the Article, made the following significant comment:

> "The gist of [the Article] was that a drying rock within T miles of the coast (where T = breadth of the territorial sea) could serve to extend the territorial waters by causing a bulge in the outer limit of the latter. . . ." International Law Commission, Sixth Session, Summary Record of 260th Meeting (1954) U. N. Doc. A/CN. 4/SR-260, p. 14.

As to whether this Article conflicted with the provisions regarding baselines, he stated, at page 16:

> "Article 13 embodied a general principle, whereas Article 6 referred to a special case.
>
> Article 13 laid down the general rule *for measuring the territorial sea from the normal baseline*, namely the low water line. For that purpose, rocks emerging at low water were to be taken into account provided, of course, that they were less than T miles from the shore. Article 6 was concerned with the exceptional case in which a state, because of its deeply indented coast, was allowed the special privilege of simplifying the perimeter of its territorial sea by drawing straight baselines as an artificial substitute for the normal baseline (low water line) because the latter would be too sinuous. Its provisions were therefore framed restrictively. If forbade the drawing of straight baselines to and from the banks and rocks emerging only at low tide."

The Commentary to Article 11 states:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges ac-

cordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

The Final Report of the International Law Commission [Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159)] contained the following provisions:

"Baselines shall not be drawn to and from drying rocks and drying shoals." [Art. 5 (1); this eventually became Convention Art. 4(3)]."

"Every island has its own territorial sea. "[Art. 10; eventually Convention Art. 10 (2)]"

"Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extention of the territorial sea." (Art. 11; eventually Convention Art. 11).

The Commentary to this Article stated, at p. 17:

"Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

These excerpts from the proceedings of the International Law Commission are set forth in detail in order to show conclusively the true meaning of Article 11, and its relationship to Articles 4 and 12. Article 11 expresses the principle that when a low tide elevation is situated within the territorial sea as measured from the actual coastline, it possess its own territo-

rial sea, and accordingly causes a bulge in the territorial sea of the coastal State. This principle is represented pictorially at 1 Shalowitz, *supra*, at p. 226, and 2 Shalowitz, *supra*, at pp. 379-380; and in Pearcy, *supra*, at p. 9. On the other hand it is quite clear that low tide elevations cannot cause an extension of internal waters. This is clear from Article 4, which prohibits the drawing of straight baselines to and from low tide elevations, and which permits internal waters to be extended to other off-shore features only when such features are so integrally related to the coastline as to constitute a part thereof. As McDougal and Burke state,

"[T]he provision in Article 11 was not intended to authorize drawing of baselines from or to a drying rock or to create internal waters by the authorization contained in this Article." Public Order of the Oceans (1962), p. 394.

"What the Article authorized in this interpretation, was only extension of the outer limit of the territorial sea and this does not require laying down baselines. *Nor does it necessitate regarding areas landward of the drying rocks as internal waters.* This appears to have been the result sought by the [International Law] Commission." (Emphasis supplied.) Ibid., at p. 394, fn. 237.

"[Article 11] deliberately emphasizes that the purpose of using the drying rock was to affect the outer limit of the territorial sea and not to create new areas of internal waters." Ibid., p. 396.

Article 12, which sets forth the rules for drawing the median line in the territorial sea, must be interpreted in this context. This article, read together with Article 11(1), states that the median line *in the territorial sea* may be measured from those low tide elevations which are located within the territorial sea of the coastal State as measured from the actual coastline. *This is because low tide elevations so situated are deemed to possess their own territorial sea*, and cause an outward bulge in the coastal State's territorial sea. Therefore, in drawing a median line in territorial waters between opposite States, when there

exist low tide elevations within the breadth of the territorial sea as measured from one coast, the line must be drawn so as to take into account the territorial sea possessed by these elevations, and the consequent extension of the coastal State's territorial sea. In short, the median line divides the territorial sea of the low tide elevation and that of the opposite coast. See Francois, Addendum to Second Report. . . . , *supra*, at page 8.

The same does not apply in internal waters, such as the river. Low tide elevations do not possess their own internal waters; and it has been shown that they cannot extend internal waters. There is no zone of internal waters appertaining to low tide elevations, and no bulge in the coastal State's internal waters, which must be taken into account in drawing the median line. In fact, to measure the median line from such elevations in internal waters implies that they do extend internal waters, which is contrary to the Territorial Sea Convention.

Viewed in another sense, in a case of opposing coasts, since Article 6 of the Continental Shelf Convention and Article 12 of the Territorial Sea Convention do not allow claims beyond the mid-point as measured from the respective mainland baselines, *i.e.*, from the edge of internal waters, the bulging allowance is without effect in cases where the "shelves" or "seas" touch. See also *US* v. *Louisiana*, 394 U.S. 11 at 47.

(b) Evidence of Application of the Rule Disregarding Low Tide Elevations in International Law

(1) *Decisions of U.S. Courts.* While American courts have not as yet passed on the question specifically posed by this situation, the Supreme Court has come close to doing so on several occasions. In the case of *US* v. *California*, Supplemental Decree, 382 US 448 (1965), the Court construed the Submerged Lands Act, 43 USC §1301 *et seq.*, and held that the term "coast line" included the line of mean low water on islands and low-tide elevations as well as the mainland. 382 US 448, 449 (1965). This was, however, with regard to the situation in which the coastline in question was of a normal configuration and there was no issue of states with opposing coastlines. To underscore the point that this was not a universal rule, the Court went on to note that "[r]oadsteads, waters between islands, and waters between islands and the mainland are not

per se inland waters." *Id.* at 451. In other words, in some situations the baselines referred to in Article 6 on the Continental Shelf Convention and Articles 3 and 12 of the Territorial Sea Convention would not be marked on islands or low-tide elevations off the coast. The easiest such instance to note would be that case in which a low-tide elevation outside the mainland-measured territorial sea would not have effect in possible expansion of the sea width; *another instance is the case of opposing coastlines.*

A second relevant case is *Texas* v. *Louisiana*, 410 US 701 (1972) wherein the Court in effect separated the issue of the "halving" of the river from that of the ownership of the islands in it. To accomplish this it would be necessary to measure the median line from the shores and not from the islands in the river. See 410 U.S. at 712. See also the earlier discussion of this case in part I (d) above.

(2) *International Court of Justice.* The ICJ has had occasion to consider the question, this coming in the *North Sea Continental Shelf Cases.* ICJ Reports (1969) at 3. In discussing the use of median lines for opposing coastlines, the ICJ stated that "[t]he continental shelf area off, and dividing opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delineated by means of a median line; and, *ignoring the presence of islets, rocks and minor coastal projections*, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved." *Id.* at 57, para. 36. [Emphasis added.]

(3) *International Practice*

United Kingdom. The position of the UK at the 1958 Law of the Sea Conference was stated to be thus: On the question of drawing a seabed boundary using equidistance principles, "islands should be treated on their merits, very small islands or sand banks being considered as having no continental shelf but only an appropriate territorial sea. . . . It would seem most inequitable, for instance, if the existence of an island or islet (which by definition need only be a small above-water rock or sandbank, possibly only a few yards long and a few feet high)

should be allowed to divert a boundary and thus give extensive areas of shelf to the State possessing the island. Should such an island exist about halfway between opposite States, both on the same continental shelf, and its base lines be allowed to be used in forming the median line, this line would be switched from the middle of the area separating the States to three quarters of the way across, towards one side or the other, dependent upon the sovereignty of the islet. This of course is an extreme case, but any island near a boundary may have a similar but lesser effect. It might seem reasonable under such circumstances not to permit these islands to have any influence on a boundary but to allow them only their own belts of territorial sea for the purposes of exploration and exploitation." R. H. Kennedy, *Brief Remarks on Median Lines and Lines of Equidistance and on the Methods Used in Their Construction* , April 2, 1958, UN Doc. A/Conf. 13/C.4/SR, 32 at 2, 7-8.

Treaties and Agreements. In addition to these statements which encapsulate the views of many States, there are a number of treaties and boundary settlements which either tend to ignore the presence of rocks and islets or to trade them off, *i.e.*, to disregard them in establishing the baseline for a boundary line. Among them are: *Indonesia/Malaysia*, Department of State, Boundary Studies, Limits in the Seas, LIS 1 (1/22/70); *Norway/Sweden*, LIS 2 (1/22/70); *Bahrain/Saudi Arabia*, LIS 12 3/10/70); *Norway/USSR*, LIS 17 (5/27/70); *Iran/Qatar*, LIS 25 (7/9/70); *Denmark/Sweden*, LIS 26 (7/16/70); *Italy/Yugoslavia*, LIS 9 (2/20/70); *Iran/Saudi Arabia*, LIS 24 (not dated); *Abu Dhabi/Qatar*, LIS 18 (5/29/70).

Austro-Polish Boundary Treaty of 9 February 1776 (Martens, R² II, 124), Article I; *Treaty of San Ildefonso* (Spain/Portugal) of 1 October 1777 (*id*., R², II, 545), Article 14; *Franco-Austrian Peace Treaty of Vienna*, 14 October 1809 (*id*., N.R. I, 210), Article 11; *Peace Treaty of Paris* of 30 May 1814 (*id*., N. R., II, 1), Article III *sub* 5; *Russo-Turkish Treaty of Adrianople* of 14 September 1829 (*id*., N.R., VIII, 152), para. 3; Article 2(2) of *Protocol No. 33* of the European Commission for the Delimitation of Bulgaria of 20 September 1879 (*id*., N.R.G.², V, 680 *et seq*., *sub* 1, at p. 682; *Franco-Siamese Treaty* of 3 October 1893 (*id*., N.R.G.², XX, 172-752); Article 4

of the *Treaty between the Argentine and Brazil* of 6 October 1898 (*id*., N.R.G.², XXXII, 397); Article 6 of the *Agreement between the Union of South Africa and Portugal* of 22 June 1926 (*id*., N.R.G.³, XXIII, 299).

Commentators. While many writers have covered the question of where the equidistant line is to be drawn from, few have explicitly addressed the issue of the complications caused by islands and rocks. We must therefore attempt to infer their intent; in doing so we see that by the use of terms such as "shores" or "edge," they have thought that the question of islands, etc., was not of a critical nature. For example, Bouchez writes that "[t]he median line involves every point on the line being equidistant from the nearest point or points on *opposite shores of the lake, river or strait*." Bouchez, The Fixing of Boundaries in International Boundary Rivers, 12 *Intl. & Comp. L.Q.* 789, 792 (1963). [Emphasis added.]

Verzijl notes that "[t]reaty relations dealing with the State frontier in the case of the existence of islands in a boundary river are legion and many of them date of a much earlier period.

"In the majority of cases it was the median line or is at present the thalweg of the river, which is decisive for the appurtenance of islands to one or the other of the riparian States. This was admitted as far as the thalweg was concerned at an early stage. It is more rare that, inversely, the exact *trace* of the water frontier is dependent upon the existence or the location of islands to the effect that the thalweg boundary is locally abandoned in places where the presence of islands is of primary importance." Verzijl, *International Law in Historic Perspective*, Vol. III (1970) at 569.

In a similar vein, Glos tends to separate the issue of isles from that of median line determination: "With respect to isles, whether existing or newly arising, all isles or their parts situated between the river bank and the median line, if median line division is adopted, and all isles situated between the mid-channel line and a river bank, if the mid-channel line is taken, belong to that particular river bank." Glos, *International Rivers: A Policy-Oriented Perspective* (Singapore 1961) at 237.

According to Ely, "[w]here an islet lies on the same side of a median line (drawn in disregard of that islet), as does the

mainland of the nation owning it, of course no question arises as to the area of the continental shelf which appertains to that islet. This area, whatever it may be, is included within the larger area which is encompassed by the median line between opposite coasts of mainlands or large islands." Ely, Seabed Boundaries Between Coastal States: The Effect Given to Islets as "Special Circumstances," 2 *Intl. Lawyer* 219 (1972) at 232, n. 13.

III.

EQUITABLE CONSIDERATIONS AND "SPECIAL CIRCUMSTANCES."

Another cogent reason for the elimination of small islets and rocks from the determination of the median line baseline is the concept of equitable apportionment of seabed resources. When it is realized that the right of each state to utilize the river and the harbor for common navigation is inalienable and protected by the Federal navigational servitude, it becomes clear that what is sought is a fair and equal distribution of the living resources of the bed, *i.e.*, lobsters and shellfish. See *Texas* v. *Louisiana*, 410 US 701 (1972) wherein it is stated that "[i]t is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg." *Id.* at 710. See also *Report* of Special Matter at 43, n. 85.

To hold that the dividing line between the States is located in the spot chosen by the Special Master would be to grant a disproportionate share of the fishery to the State of Maine, based on the fact that it is bordered by a group of drying rocks, whereas New Hampshire is not.

"The function of a river—the manner in which a river is used—should be the determining factor in deciding which type of boundary will be applied *in concerto*." Bouchez, The Fixing of Boundaries in International Boundary Rivers, 12 *Intl. & Comp. L.Q.* 789 (1963) at 797. "[I]f, for example, fishing is also important, then it is perhaps more equitable to apply the me-

dian line, provided that it is stiuplated explicitly that there is free navigation in the whole river for ships belonging to both nations." *Id.* at 798.

"Such a system of delimitation has been practiced in, for instance, the Passammaquoddy [sic] Bay. In pursuance of such regulations freedom of navigation is guaranteed while each nation controls a fishing area of equal size. In all other cases—in all situations in which navigation is not a relevant factor—the median line, in general is to be preferred. Even when the interests are dissimilar the median line is the best solution. The main argument supporting the latter statement is that both States under such a solution are entitled to claim equal amounts of the water of the river." *Id.*

In a restricted area such as Portsmouth Harbor, it is inequitable to give effect indiscriminately to small outcroppings or low tide elevations, in calculating the median line.

"Generally, these islands will be small and uninhabited, falling in the rock and islet categories previously defined. Many of these troublesome 'dots' of real estate are found within 12 miles of the equidistant line constructed without their use as basepoints. They have the effect of displacing (assuming a position near mid-point on an opposite situation) the boundary approximately a quarter of the width of the body of water; they may continue to influence a displacement along the water body's length for a maximum distance equal to the width of the body. The inequity would be obvious." * * *

"Thus the ignoring of small islands may involve a desire for simplification of alignment or a perception of equity. In either instance, developing state practice acknowledges a case for the elimination of certain insular basepoints." Department of State, Bureau of Intelligence and Research, *Islands: Normal and Special Circumstances*, RGES-3 (1970) at 58-60.

New Hampshire does concede that Wood Island in Portsmouth Harbor meets the tests of association with the Maine coast sufficiently to be counted as part of the mainland. It qualifies under the parallel lines test of Boggs, *supra* at 257, 258. Further, Chart No. 211 shows that Wood Island is separated from the mainland by only a two foot deep strip of bed upon which piles are built. If Wood Island is used as a point of reference in calculating the median line (to the exclusion of the

low tide elevation at Whaleback Reef) a more equitable division of the disputed area results.

Furthermore this sort of a case, wherein the boundary maker ought to take into account considerations which lie outside the realm of black-letter law, has received international recognition in the form of the "special circumstances" rule found in Article 6 of the Shelf Convention and Article 12 of the Territorial Sea Convention.

The importance of islands affecting a median line was noted by both the Netherlands and Denmark in the *North Sea Continental Shelf Cases*, ICJ Reports (1969), when the ICJ acknowledged their claim of "special circumstances" in the case of islets, commenting that "only the presence of some special feature, minor in itself—such as an islet or small protuberance—but so placed as to produce a disproportionately distorting effect on an otherwise acceptable boundary line would, so it was claimed, possess this character." *Id*. at 20, para. 13.

The Court later laid out several criteria which should be given weight in determining the equidistant line and in considering special circumstances with regard to islands:

> (1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
> (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring between the extent of the continental shelf areas appertaining to the coastal State and the length of the coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region.

Id. para 101 D.

IV.

CRITIQUE OF THE SPECIAL MASTER'S REPORT

The determination of the Special Master that the midline of the river, rather than the thalweg, is the proper boundary is accepted. Likewise, his statement that "[t]he theoretical answer [to the question of location of the point of intersection] is that the middle or median line following the meandering of the river and everywhere equidistant from the nearest points on opposite sides using the actual water edges at the mean low water line" is correct. In a single footnote (note 84 at 42 and 43) the Special Master failed, however, to set the stage for his final pronouncement, for the following reasons:

(a) The reference made to Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (1940), at 179-184, "for an explanation of the principles used in drawing such a line equidistant from the nearest points of either State along the river, including low-tide elevations" was a misinterpretation. In point of fact, the text on the pages he notes not only does not support his theory of using low-tide elevations, but never even mentions that term or the related "drying rocks"; the closest Boggs comes to the topic is to mention briefly that lake boundaries can be measured to the "shoal water on each shore." Boggs at 180 (citing the International Waterways Commission). Boggs' recurring reference to the shores of lakes would lead one to believe that it was the mainland he was discussing, a thesis given support by his proposed method of determining sovereignty over disputed islands, viz: to first draw the median line from the mainland shores and then equitably apportion the islands. Similarly, the citation to Shalowitz is not in point.

(b) The issue of whether or not the Decree of 1740 does in fact state a "preference for using the low water line" is not material; the universal rule regarding the use of low-tide lines controls and is not inconsistent with the language of the Decree, properly understood.*

(c) The Special Master relies on Article II of the Convention

* "Black Rocks" are shown on the Mitchell Plan, Appendix C to Special Master's Report, and are close to the northerly bank of the Merrimack River in the harbor at Newburyport. In this context, they were used as a natural monument for measuring distance overland, not as a point of reference for a median line.

on the Territorial Sea and Contiguous Zone, 15 UST 1607, TIAS 5639 which he says "urges the use of the low-water line and low-tide elevations to establish the baseline for measuring the breadth of the territorial sea." This is not a proper interpretation of Article 11, as pointed out earlier in this brief.

The Convention does not "urge" the use of low-tide elevations as baselines but rather allows for it, the language employed being: "the low-water line on that elevation *may* be used as the baseline." Art. 11 [Emphasis added.] When compared with other provisions in the Convention which employ the word "shall," for example, Article 13 dealing with baselines on river mouths, the lack of urgency becomes readily apparent.

In sum, Article 11 does not urge the use of low-tide elevations and neither does it apply to situations of opposing coastlines, the latter calling into play special rules which were covered previously.

(b) *Reference to United States* v. *Louisiana*. The next point made by Special Master was that the Supreme Court "has indicated that for purposes of drawing baselines under the Convention's rationale there is 'no distinction' between low-tide elevations and islands, "so citing *U.S.* v. *Louisiana*, 394 US 11, 60, n. 80 (1969), and the reaffirmation found at 420 US 529 (1975). Here the Special Master's interpretation is plainly incorrect. At issue in the Court's statement was "whether a headland of an indentation [a bay in that case] can be located on an island." 394 US 11 at 60. The dictum contained in note 80 stated that "*in this context* there can be no distinction between them." *Id*. [Emphasis added.] In the regime established by the Convention there is a marked distinction between rivers and indentations (*i.e.*, bays); likewise the regimes of opposing coastlines and bay closures are dissimilar. Inasmuch as these are the contexts within which the instant case falls, one must look to Articles 13 (Rivers), and 12 (Equidistance) of the Convention; the rules of construction developed by the Supreme Court for Article 7 on bays are not applicable and the dictum of note 80 cannot be applied.

(e) *Precedents*. The Special Master undertook to cite three instances of international practice to support the argument for inclusion of islands in midline determination. Not only are these three agreements less than satisfactory when compared with those cited in this brief, above, but are also weak when

standing alone. Taking, as an example, No. 60 (Indonesia/Singapore): The reference here is to three of the six points chosen by the parties to delineate the territorial sea between them. Although the text, at 3, states that low-tide elevations were the measuring points for the equidistant line, it is submitted that this characterization was incorrect, with low-tide *line* the intended term. The thesis is borne out by several factors:

1. In the explanation of the locating process, the reference points are stated as named locations and the accompanying map shows them variously as islets or mainland shores.

2. In the summary section, at 5, it is noted that: "*Islands* were utilized as basepoints for the construction of the territorial sea boundary." [Emphasis added.] It makes no reference to low-tide elevations.

The Special Master was wrong to rely on this agreement to support the low-tide elevation theory. The islands utilized there were in effect assimilated to the main shore because of their integral relationship thereto, having met the straight baseline tests.

When these three agreements are compared to the precedents found in the international agreements listed above, it becomes clear that practice in general opposes the rule advanced by the Special Master.

(f) At the conclusion of his footnote, the Special Master states that "[t]he significant points in the Piscataqua Harbor are those low-tide elevations and low-water lines on either side of the harbor that are nearest to each other: the low-water line at Odiornes Point and rocks that expose at low tide off Jaffrey Point and in Whaleback Reef." We submit that this determination was based on unsupported premises and should not be accepted. Instead, the methods of median line-determination outlined in this brief, above, should be employed in delineating the New Hampshire-Maine boundary line at the point where it crosses the closing line of Portsmouth Harbor.

V.

CORRECT EQUIDISTANT POINT

Consistent with the rules of construction advocated in this

brief by New Hampshire, the point at which the median line of the River and Harbor ought to intersect the closing line of the Harbor is at the point on the closing line which is an equal distance from the nearest points on the shore (measured at the low-water line or a triangular extention thereof) of each state.

The New Hampshire locus is the low-water line at the northerly apex of Jaffrey Point and the Maine locus is the low-water line at the southern edge of Wood Island. The point on the harbor's closing line equidistant from these two loci has the geographic position of 43° 3' 9" North and 70° 42" 00" West, or approximately 350 yards northeasterly of the point selected by the Special Master. It is to this point that the River median line extends and from it that the straight line to Gosport Harbor runs.

VI.

CONCLUSION

For the reasons stated above, the exceptions of New Hampshire should be sustained. The decree recommended by the Special Master should be modified so as to locate the point at which the median line between the banks of the Piscataqua River intersects the closing line of Portsmouth Harbor at the geographic position of 43° 3' 9" North and 70° 42' 00" West, or approximately 350 yards northeasterly of the position selected by the Special Master. This position should be the northwesterly terminus of a state boundary proceeding in a straight line in a southeasterly direction to the position which is the geographic middle of the entrance to Gosport Harbor in the Isles of Shoals. In all other respects the report of the Special Master should be confirmed and its recommendations incorporated in the final decree, particular reference being made to the recommendation of provisions for marking the boundary (Report p. 59, note 116).

Respectfully submitted
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APPENDIX A

TERRITORIAL SEA CONVENTION (15 UST 1607, TIAS 5639)

Art 3 Baselines. Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Art 10 Islands. 1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide. 2. The territorial sea of an island is measured in accordance with the provisions of these articles.

Art 11 Low-tide Elevations. 1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Art 12 Equidistance. 1. Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision. 2. The line of delimitation between the territorial seas of two States lying opposite to each other shall be marked on large-scale charts officially recognized by the coastal States.

Art 13 Rivers. If a river flows directly into the sea, the

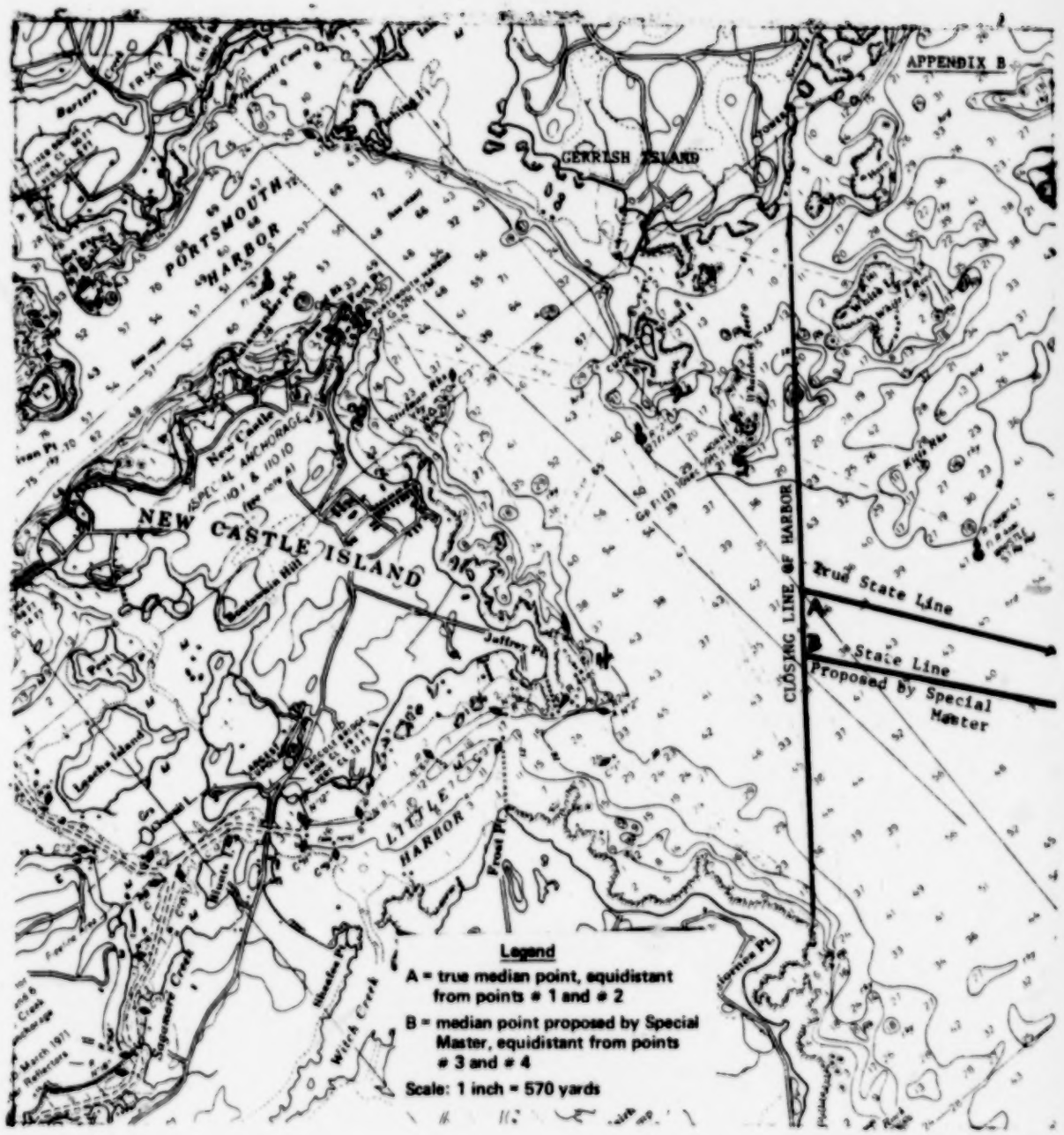
baseline shall be a straight line across the mouth of the river between the points on the low-tide line of its banks.

CONTINENTAL SHELF CONVENTION (15 UST 471, TIAS 5578)

Art 6 Adjacent Shelf. 1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

. . . .

APPENDIX B


PORTSMOUTH HARBOR
GERRISH ISLAND
NEW CASTLE ISLAND
LITTLE HARBOR
CLOSING LINE OF HARBOR
True State Line
State Line Proposed by Special Master
Legend
A = true median point, equidistant from points # 1 and # 2
B = median point proposed by Special Master, equidistant from points # 3 and # 4
Scale: 1 inch = 570 yards